No. 92-3
No. 91-2077

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's directed verdict dismissing all arrest-related claims because probable cause to arrest Bailey existed.

2. Whether the Court of Appeals correctly affirmed the District Court's final judgment based on the jury's verdict dismissing all claims against Alachua County because there was no finding of an official policy or custom which could result in any deprivation of Bailey's rights.

3. Whether the Court of Appeals correctly affirmed the District Court's orders granting Respondents qualified immunity with respect to Bailey's pre-deprivation procedural due process claims.

4. Whether the Court of Appeals correctly found no fair support in the record for the District Court's conclusion that a juror would be impartial even though doubts of bias existed.

5. Should certiorari be granted, Respondents would present two additional questions. These are stated in Respondents' Petition for a Writ of Certiorari filed sub nom. *Hayes, et al. v. Bailey*, No. 91-2077.

PARTIES BELOW

In addition to the parties named in the caption, the parties to the proceedings below were Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities; L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities; City of Gainesville, Florida; John Stanton Tileston, Sr.; Charles Jerkins; and Spencer Mann.

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No. 92-3
No. 91-2077

In The

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October Term, 1992

GREGG FITZGERALD BAILEY,

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v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Board of County Commissioners of Alachua County, Nate Caldwell, Colleen Hayes, Tom Allison, Stephen Garrahan, James Strauss and Gary Brown respectfully request that the Court deny Gregg Fitzgerald Bailey's Petition for a Writ of Certiorari seeking review of certain aspects of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

COUNTERSTATEMENT OF THE CASE

A. The Matter In The Courts Below

In this action, filed by Gregg Bailey ("Bailey") and his wife in the District Court for the Northern District of Florida, pursuant to 42 U.S.C. § 1983 ("Section 1983") and state law, Bailey complained that he had been denied due process in connection with his arrest and suspension from his employment as a corrections officer with the Alachua County Corrections Department. All defendants moved to dismiss or for summary judgment. On July 2, 1990, the District Court entered an order granting those motions as to many of the defendants in whole or in part. (Petitioner's Appendix at 1b-51b)

At the beginning of the five-week trial on Bailey's remaining claims, on July 9, 1990, the District Court granted Respondent Allison summary judgment and dismissed him from the action. At the close of all the evidence, the court directed verdicts for a number of defendants, including Respondents Garrahan, Strauss and Brown, on the ground that the arresting officer, Tileston, had probable cause to arrest Bailey. The claims which remained were employment procedural due process claims against Respondents Alachua County, Hayes and Caldwell. Those claims were submitted to the jury which returned a verdict in favor of the County and against Hayes and Caldwell.

Bailey appealed to the Eleventh Circuit Court of Appeals the District Court's judgments in favor of the majority of the defendants. Caldwell and Hayes cross-appealed. The decision of the Court of Appeals was entered on March 31, 1992, upholding the District Court's

judgment with respect to all defendants except Allison, Caldwell and Hayes. The Court of Appeals reversed the District Court's granting of qualified immunity to Allison and affirmed its denial of qualified immunity to Caldwell and Hayes with respect to certain post-deprivation procedural due process claims. The Court of Appeals remanded the case for a new trial of Allison, Caldwell and Hayes.

On June 1, 1992, the Court of Appeals denied Bailey's suggestion for rehearing en banc. (Petitioner's Appendix 1c-2c) On June 4, 1992, Hayes and Caldwell filed with the Court of Appeals their motion for stay of the mandate pending consideration by this Court of their Petition for a Writ of Certiorari. On June 26, 1992, Hayes, Caldwell and Allison filed their Petition with this Court, requesting that the Supreme Court consider two questions on the issue of qualified immunity. That Petition is styled *Hayes, et al. v. Bailey*, No. 91-2077. On June 29, 1992, Bailey filed this Petition.

B. Counterstatement of the Facts

In summarizing the facts for review, Petitioner apparently does not contend that the courts below erroneously relied on any disputed facts. Rather, Petitioner simply states his version of the facts and bases his arguments for granting the Petition on them.[1] However, the material

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[1] In Petitioner's statement of the case, he refers to many alleged undisputed facts without record citation. Pursuant to

(Continued on following page)

facts, as relied on by the Court of Appeals, and supplemented by the District Court record, are as follows.

Bailey, a former corrections officer at the Alachua County Department of Corrections (ACDC), developed a relationship with an inmate, Charles Jerkins. The relationship dated from December 1986 when Bailey was assigned to guard Jerkins in the hospital. On April 22, 1987, several inmates attempted to escape from ACDC by sawing a window with hacksaw blades. (Petitioner's Appendix at 4a-6a) The attempt was foiled.

Prior to the escape attempt, Bailey had written a letter, dated February 1, 1987, to ACDC Chief of Security Garrahan, in which Bailey made vague references to illegal inmate activities. Bailey made no reference to Jerkins in the letter. Major Garrahan asked the appropriate shift lieutenant, James Strauss, to handle the matter. (Petitioner's Appendix at 28a) Strauss was of the view that Bailey was being approached by inmates just as others often were and he did not take seriously Bailey's professed concerns. (R35-567-36 to 40,105 to 107) Bailey never filled out an incident report with specific information. (R24-572-207,208) (R35-567-40)

(Continued from previous page)

Supreme Court Rule 15, Respondents note throughout this brief those facts which are material, with citation to the Eleventh Circuit's reliance on those facts, and where appropriate with citation to the trial record. Also pursuant to Rule 15, Respondents point out Petitioner's misstatements of fact and law which have a bearing on Petitioner's questions presented.

Approximately two weeks after the escape attempt, Lieutenant Brown investigated the attempt and twice Jerkins indicated that persons other than inmates were involved. Brown discussed Jerkins' statement with ACDC Assistant Director Allison and the matter was immediately referred to the State Attorney's Office. (Petitioner's Appendix at 4a) John Tileston, an investigator for the State Attorney's Office, was assigned to investigate the matter and interviewed Jerkins outside of Brown's presence. Brown told Tileston that Jerkins had said that a "professional person" had assisted in the April attempt. Brown did not give Tileston a copy of the report of his investigation. (Petitioner's Appendix at 5a)

Tileston was familiar with Jerkins as a well-known "snitch," and testified that Jerkins was a "known credible police source" and that he had verified that Jerkins had provided reliable information in the past. In his interview with Tileston, Jerkins implicated Bailey as a corrections officer who had helped obtain hacksaw blades for the April 1987 escape attempt. (Petitioner's Appendix at 5a-6a)

As a result of Tileston's discussion with Jerkins, the investigation of Bailey proceeded. Tileston determined to test whether Bailey would accept money from Jerkins and devised a plan for this purpose. The plan was devised by Tileston and was completely out of the hands of the Respondents. Tileston, with the approval of the assistant state attorney, proceeded with the pre-arrest operation. On May 13, 1987, Tileston arranged with Captain Roundtree of the Alachua County Sheriff's Department, for a recorder to be placed on Jerkins and arranged for Jerkins

to be given $500 to offer to Bailey to carry out the test. (Petitioner's Appendix at 6a)

The role of ACDC corrections officer Brown was confined to providing the State Attorney's Office with access to areas of the jail necessary for Tileston's investigation. (R28-562-165 to 167,240) (R31-565-23) (R33-566-13,14) (R38-575-22,23,26) Chief of Security Garrahan was periodically kept informed, but did not participate in any aspect of the investigation or arrest. (R31-565-21 to 23,37,38) (R33-566-13,14) (R38-575-23) The decision was made to keep the investigation quiet and limited to a certain number of people. (Petitioner's Appendix at 29a, n.8) (R31-565-38) Lieutenant Strauss was asked to help only the night before the arrest. (R33-566-15,16) (R35-567-41 to 44) (R38-575-30,31) Merely because of their jobs as ACDC lieutenants with access to both inmates and facilities, Brown and Strauss were made available to the State Attorney's Office to facilitate specific aspects of the pre-arrest operation against Bailey. (R33-566-13 to 26) (R35-567-41 to 44) (R38-575-22,23,30,31) Tileston needed help in setting up his plan and ACDC provided him with that help.

Garrahan and Strauss were not even present when Bailey was arrested, and Brown witnessed the arrest only because he was providing access to the facilities to Tileston. (R31-565-23) (R33-566-13) (R35-567-44,45,55) Garrahan did not arrive at ACDC until the morning of May 14 after the arrest. (R31-565-23) Lt. Strauss did not know about Tileston's plan until May 13, the evening before Bailey's arrest, and even then he did not recall being told that Bailey was the subject of Tileston's operation. (R33-566-16) (R35-567-41 to 45,55,56,58,108,109)

Strauss first met Tileston only on the evening of May 13, 1987, when Tileston was orchestrating the pre-arrest operation against Bailey. (R35-567-55 to 58) (R38-575-30,31)

On the afternoon of May 13th, although not instructed to do so, Jerkins called Bailey asking him to take something out of the jail for him. Bailey testified that he mentioned something to Strauss in passing as Strauss was leaving his shift around 11:00 P.M. on May 13th to go home, but in vague terms without reference to Jerkins and Strauss did not pay much attention to it. (Petitioner's Appendix at 28a-29a) Whether Strauss told Bailey to "get physical evidence" is and always has been disputed. (R35-567-45) In fact, Strauss, who was not on duty the night of these events, had ceased being Bailey's shift lieutenant in March 1987, so that Strauss was no longer Bailey's superior. (R35-567-35,41) Despite Bailey's purported concern, he did *not* tell his superior, Corporal Sullivan, who *was* on duty that night. (R24-572-211) (R35-567-8 to 12) (R25-573-65,66)

Later that night, at around 12:45 A.M. (May 14), while on duty, Bailey discussed with corrections officer Phillips his contacts with Jerkins and Jerkins' afternoon phone call. (Petitioner's Appendix at 29a) Phillips advised Bailey to tell the sergeant on duty, but Bailey did not do so. Even though Bailey's passing conversation with Strauss had taken place shortly before, Bailey did not tell Phillips that Strauss had told him to get physical evidence, a statement which Strauss denies making. (Plaintiff's Ex. 46) In addition, Bailey conducted continuous rounds and head counts with Corporals Sullivan and Lampkin and engaged in conversation with them the

entire night of May 13th and did not mention his conversations with either Jerkins or Strauss to those superiors. (R24-572-209 to 211) (R35-567-8 to 14,18 to 20,114 to 118) (R36-568-37 to 39) (R38-575-52,53)

There was a general lack of communication among the ACDC personnel and none of Bailey's discussions with Strauss or others was reported to Tileston. The lack of communication was exacerbated by the undercover internal nature of the investigation. (Petitioner's Appendix at 29a) At 1:00 A.M. on the morning of May 14, 1987, Jerkins approached Bailey to tell him that Jerkins had money for him. Later that morning, Bailey accepted the $500 from Jerkins and went about his business feeding the inmates. During the period between the moment when Jerkins handed Bailey the money, through the time when Bailey was approached by Tileston, Cole and Brown, and during the period when he was being escorted to the office, Bailey did not mention that he had been given money by an inmate. When Tileston arrested Bailey, Bailey did not tell Tileston that he had mentioned the inmate contact to Strauss the night before. It was not until he was asked for the money, after he was arrested by Tileston, that Bailey turned over the money, commenting that they would find no fingerprints on it. (Petitioner's Appendix at 8a-11a)

Upon Bailey's arrest he was afforded a hearing in state court. Criminal charges remained pending against him until November 1987. At that time an investigation into Bailey's fitness to remain a corrections officer was pending with the Florida Department of Law Enforcement (FDLE). At the conclusion of the FDLE investigation in June 1988, ACDC reinstated Bailey with back pay.

(R34-481-21 to 23)[2] However, upon the advice of his doctor, Bailey did not return to work. (Plaintiff's Ex. 52) Upon the advice of his attorney, he did not cash the checks. (R32-480-29 to 32; Defendants' Exs. 4 and 5)

Contrary to the repeated assertions of Petitioner that Caldwell and Hayes approved Tileston's plan (Petition at 10, 15) and the letters written to Bailey (Petition at 15, 16), Caldwell and Hayes were not apprised of the circumstances surrounding Bailey's situation. For example, the first time Hayes saw Bailey's November 19, 1987 letter was at her deposition in January 1989. (R32-480-103 to 105) Both Caldwell and Hayes were copied on the December 7, 1987 letter, but neither were consulted about its contents. The letter said nothing about "suspension," but merely referred to "leave without pay." (R32-480-32 to 34) (R34-481-17) (P. Ex. 11F)

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner's factual and legal misstatements alone warrant denial of his Petition for a Writ of Certiorari, because such misstatements render it impossible for this Court to even consider the questions presented. Moreover, the Eleventh Circuit Court of Appeals correctly decided each of the issues presented by Petitioner in accordance with both Eleventh Circuit and Supreme Court precedent. In addition, Petitioner raises no conflict

[2] Throughout the Petition, Bailey asserts, without supporting evidence, that he received no back pay. This is simply untrue.

among the Circuit Courts of Appeals, no conflict with decisions of this Court and no important question of federal law. The Eleventh Circuit's decision in this case regarding probable cause, governmental liability, pre-deprivation procedural due process and seating a biased juror are all soundly rooted in established law. Finally, certiorari should be denied because Petitioner has failed "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding" of the questions presented, as required by Supreme Court Rule 14.5.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly affirmed the District Court's directed verdict dismissing all arrest-related claims because there existed probable cause to arrest Bailey.

Petitioner's framing of this question is entirely dependent upon his misstatement of fact that the Respondents "knew Bailey to be innocent." (Petition at 20, 23, 24) This misstatement is not supported by the evidence. In fact, the majority of the evidence reveals that the Respondents did *not* know about Bailey's activities, his relationship with Jerkins, or his frame of mind. Nor is there evidence that any of the Respondents had concluded that Bailey was guilty or innocent with respect to any aspect of the situation confronted by Tileston, the arresting officer.

Petitioner also misrepresents the conclusion of the courts below by stating that he was subject to a "false

arrest." (Petition at 20, 23) The District Court and then the Eleventh Circuit concluded that Tileston had probable cause to arrest Bailey. (Petitioner's Appendix at 25a) Even though Petitioner is not challenging in this Petition the conclusion that probable cause to arrest existed, he bases his first question on the premise that Tileston did not have probable cause – an assumption that is unsupported by the facts found in the District Court and unsupported by the Eleventh Circuit's opinion.

As succinctly stated by the Eleventh Circuit: "The flaw in Bailey's efforts to undermine Tileston's probable cause is that Bailey's version of the facts failed to create a substantial conflict in what Tileston knew at the time of the arrest. . . . Although the lack of communication among ACDC personnel is unfortunate, none of Bailey's prior discussions was reported to Tileston." (Petitioner's Appendix at 27a, 28a) For example, Bailey makes much of Brown's failure to tell Tileston about Brown's report on the April 1987 escape attempt. (Petition at 21) The Eleventh Circuit specifically addresses this issue and disposes of it: "Bailey, however, overstates the significance of this omission. . . . The report would not have definitively established the source of the hacksaw blades used in that escape attempt, nor would it have ruled out the possibility that another escape attempt (involving Bailey) was being formulated." (Petitioner's Appendix at 30a)

Even if Petitioner's misstatements of fact do not foreclose consideration of this question, the Eleventh Circuit's statement of the law is settled and undisputed. The Eleventh Circuit correctly explained the law supporting its conclusion that once probable cause for arrest is found, no Section 1983 liability can attach. In spite of

Petitioner's statement that the Eleventh Circuit applied an "unexplained rule of law" (Petition at 23), this Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), that this doctrine stems from tort law standards as this Court has applied them to Section 1983 claims. In discussing *Pierson v. Ray*, the Fifth Circuit explained that probable cause is a defense to a claim of false arrest under Section 1983 "not because of any language in Section 1983, but because Section 1983 must be read in a manner consistent with the background of tort liability." *Whirl v. Kern*, 407 F.2d 781, 788 (5th Cir. 1969) *quoted in Rodriguez v. Jones*, 473 F.2d 599, 604-605 (5th Cir. 1973).

The most recent pronouncement of this settled principle in the Eleventh Circuit, *Marx v. Gumbinner*, 905 F.2d 1503 (11th Cir. 1990), was correctly cited by the Eleventh Circuit in this case. *Marx* and the principle it stands for could not be clearer and is fully supported by Supreme Court precedent. There is no split among the Circuits and Petitioner provides no legal argument for ignoring established precedent.

By virtue of the Petitioner's convoluted argument regarding alleged knowledge of Respondents who were not arresting officers, he is attempting to resuscitate his oft-rejected conspiracy claim. This claim was rejected by both courts below, and is not even presented in this Petition. Both courts found a complete lack of evidence of a conspiracy. (Petitioner's Appendix at 32a-34a)[3]

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[3] Petitioner makes reference to possible discoveries that Tileston could have made after he arrested Bailey. (Petition at

(Continued on following page)

Contrary to Petitioner's impassioned viewpoint, failure to communicate is not, and cannot be, the basis for a Section 1983 claim.

II. The Court of Appeals followed this Court's holding in *City of St. Louis v. Praprotnik* and correctly affirmed the District Court's final judgment dismissing all claims against Alachua County because there was no evidence of an official policy or custom which could result in any deprivation of Bailey's rights.

The factual and legal misrepresentations committed by Petitioner in this argument are designed to obfuscate the obvious conclusion to be drawn from reading the Eleventh Circuit's opinion together with this Court's opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) – that the County Commission was the final policy-making authority for the County personnel policy and that policy is not responsible for any constitutional deprivations claimed by Bailey.

The fundamental premise upon which Petitioner bases his argument regarding governmental liability is on

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23, 25) However, the law is also clearly settled that the existence of probable cause is to be judged at the time of the arrest. Subsequent events or proceedings have no bearing on the existence of probable cause for purposes of determining Section 1983 liability. "Once probable cause has been established, the legality of the arrest is not affected by collateral bad faith of the arresting officer or a subsequent dismissal or acquittal of the charges." *Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. Unit B 1981). *See also Hunter v. Clardy*, 558 F.2d 290, 292 (5th Cir. 1977).

the assumption that his constitutional rights were violated by the wrongful acts of Respondents. Petitioner goes so far as to state that "[n]o one can dispute that Bailey was repeatedly deprived of his constitutional rights by wrongful, purposeful acts of Caldwell, Hayes and Allison and that those unconstitutional acts caused him extreme and permanent injury." (Petition at 38) Respondents *do* dispute this assumption and the Eleventh Circuit certainly does not agree with this statement.[4]

Petitioner deliberately misstates the standard for determining qualified immunity of public officials in a clear attempt to bolster his argument that the defense of qualified immunity conflicts with the law of governmental liability (as enunciated by this Court in *Monell v. New York City Dept. Soc. Serv.*, 436 U.S. 658 (1978) and *City of St. Louis v. Praprotnik, supra*). Petitioner states that "Allison, Caldwell and Hayes claim (or will claim) qualified immunity on the ground that County's personnel rules were not comprehensive and clear. . . ." (Petition at 29) This statement is irrelevant to the inquiry required to determine whether a public official is qualifiedly immune from Section 1983 liability.[5] The protection of public

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[4] Another basic factual misstatement related to this question is Petitioner's repeated and incorrect statement that he was never paid. To the contrary, he received back pay and chose not to cash the checks. (R32-480-29 to 32; Defendants' Exs. 4 and 5)

[5] As fully discussed in the Petition of Respondents Allison, Caldwell and Hayes, No. 91-2077, and as enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), to determine

(Continued on following page)

officials from personal liability is completely separate and distinct from the issue of governmental liability. The two issues are not, and should not be, linked.

The unstated aim of Petitioner's second question is to convince the Court that the County should be adjudged liable on a theory of *respondeat superior*. However, this concept has clearly been rejected by this Court and by Congress. *Monell*, 436 U.S. at 691-694. In order to hold a local government liable, an official policy or custom of the government itself must be responsible for inflicting the injury. *Id*. This Court expanded further on the standard for governmental liability in *Praprotnik* and the Eleventh Circuit in this case followed that precedent without deviation.

As in *Praprotnik*, in this case there is no evidence indicating that the County Commission delegated to anyone its final authority in respect of the personnel policy set by the Commission. 485 U.S. at 128. The Eleventh Circuit correctly applied *Praprotnik* in holding that the final policy-making authority in this case rested with the County Commission. (Petitioner's Appendix at 48a)

(Continued from previous page)

qualified immunity the court must inquire whether a reasonable public official, in light of the clearly established law and the information possessed by that official, could have believed that the action taken was unlawful. *Anderson*, 483 U.S. at 641. Petitioner also misstates the Eleventh Circuit's holding with respect to Bailey's post-deprivation procedural due process claim. This issue is fully treated in the Petition of Allison, Caldwell and Hayes.

Petitioner's argument is merely a restated view that *respondeat superior* liability should apply. This Court has clearly addressed the issue of local governmental liability. As this Court stated in *Praprotnik*: "Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior*, ad hoc searches for officials possessing such *"de facto"* authority would serve primarily to foster needless unpredictability in the application of Section 1983." 485 U.S. at 131.

This Court has fully explicated the standard for assessing local governmental liability. This case raises no new issues in that regard and certainly requires no change in the law, nor does it require this Court to fine-tune its prior decisions.

III. The Court of Appeals correctly affirmed the District Court's orders granting Ailison, Caldwell, Hayes and Alachua County summary judgment with respect to Bailey's pre-deprivation procedural due process claims.

In this argument, Petitioner challenges the Eleventh Circuit's affirmance of the granting of qualified immunity to Respondents with respect to Bailey's pre-deprivation procedural due process claim. However, Petitioner once again misstates the legal analysis for qualified immunity. In the text of this third question, Petitioner misrepresents the standard as immunity from liability "merely because the exact factual situation had not been confronted before." (Petition at 39) The correct analysis is discussed by Respondents in Section II of this Opposition and is

analyzed in detail in their Petition for Writ of Certiorari (No. 91-2077).[6]

As with the other questions presented in this Petition, Bailey's misstatement of key facts make consideration of the issue raised virtually impossible. He incorrectly asserts, with no supporting evidence, that Caldwell and Hayes approved the suspension letter and that Bailey received no pay. (Petition at 40) Moreover, as in the argument Petitioner makes in connection with his first question presented, once again he is using this question as a pretext for interjecting his failed conspiracy theory. Petitioner states, in direct contradiction to the evidence and the rulings of both courts below, that "this action was prearranged by these Defendants in connection with the plan to set a trap to arrest Bailey." (Petition at 40) Even though Petitioner is not requesting review of the Eleventh Circuit's affirmance of the District Court's rejection of his conspiracy claim, he continues to raise it under the guise of other issues – none of which warrant review.

Petitioner makes these false statements and promotes these misapprehensions to lend credence to his argument that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), requires notice and a hearing before suspension

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[6] To the extent that there are issues for review in this case with respect to qualified immunity, they are as presented in the Petition of Respondents Hayes, Caldwell and Allison. If review of those issues is granted, this Court will be in a position to resolve the only issues left unresolved by the Eleventh Circuit and will also resolve the split among the Circuits regarding whether the issue of qualified immunity may be submitted to the jury.

from public employment under all circumstances. (*Loudermill* held that a delay of nine months in providing a post-deprivation hearing was not constitutionally infirm.) However, the Eleventh Circuit did not depart from the principles adopted by this Court that it had "rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." (Petitioner's Appendix at 41a quoting *Parratt v. Taylor*, 451 U.S. 527, 540 (1981))

In this case, the Eleventh Circuit correctly pointed to the "flexibility in the constitutional requirements pertaining to a pre-deprivation hearing." (Petitioner's Appendix at 41a, n.12) The Court then applied that flexible legal standard in this case: "A corrections facility's paramount concern is security; a guard suspected of corruption compromises that security. Therefore, the defendants could have reasonably believed that this was a situation with a 'necessity for quick action' that made a pre-deprivation hearing impracticable." (Petitioner's Appendix at 42a)[7]

Petitioner raises no issue worthy of this Court's consideration in connection with pre-deprivation due process. There is no split among the Circuits and, contrary to

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[7] With respect to the suspension with pay alternative proposed by the Petitioner, as pointed out by the Eleventh Circuit, the existence of one sentence expressed in *Loudermill* in passing was not sufficient for Bailey to carry his burden of showing that suspension with pay under these circumstances was required by clearly established law. (Petitioner's Appendix at 43a, n.13)

Petitioner's contention, there has been no deviation from this Court's precedents.

IV. The Court of Appeals correctly found no fair support in the record for the District Court's conclusion that a juror would be impartial even though doubts of bias existed.

Through overstatement, misstatement and selective omission, Petitioner mischaracterizes the evidence of bias of juror Johns. The Eleventh Circuit examined the full transcript of the juror's voir dire and correctly concluded that there was no fair support in the record for the District Court's conclusion that she could or would be impartial. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984). Contrary to Petitioner's unsupported assertion that the standard of review should involve some form of "customary deference," the *Patton* standard, correctly applied by the Eleventh Circuit in this case, subsumes that concept. If there were "fair support in the record," deference would be appropriate. However, that is not the case here.

The Eleventh Circuit pointed out that "Johns testified that she knew many of the potential witnesses through her employment." (Petitioner's Appendix at 62a, citing to the trial record) The Eleventh Circuit also stated: "The record in this case leaves juror Johns' impartiality in question." (Petitioner's Appendix at 63a) Petitioner fails to mention that the District Court judge interrupted Johns at a crucial moment in her voir dire testimony. (Petitioner's Appendix at 63a) In fact, even the portions cited in the Petition itself show that "Johns' responses to

whether her connections to Bailey would make any difference to her ability to serve as an impartial juror were hesitant and equivocal." (Petitioner's Appendix at 64a and Johns' testimony reproduced at 64a, n.21)

Furthermore, Petitioner presents a garbled argument claiming that the standard applied by the Eleventh Circuit "derogates from the unfettered right of litigants such as Bailey to exercise peremptory challenges without being manipulated unfairly." (Petition at 47) Petitioner provides no support for this complaint. The argument behind this assertion is practically impossible to discern. Of the four questions presented in this Petition, this question most notably fails to accurately and clearly present "whatever is essential to a ready and adequate understanding" of the question, as required by Supreme Court Rule 14.5. This question fails utterly to express a reason for granting review.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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